

TULANE MARITIME LAW JOURNAL

VOLUME 33

WINTER 2008

NUMBER 1

CONTENTS

ARTICLES

PROTECTIONS AFFORDED TO
CAPTURED PIRATES UNDER
THE LAW OF WAR AND
INTERNATIONAL LAW *Michael H. Passman* 1

THE *ERIKA* JUDGMENT—
ENVIRONMENTAL LIABILITY
AND PLACES OF REFUGE:
A SEA CHANGE IN CIVIL AND
CRIMINAL RESPONSIBILITY
THAT THE MARITIME
COMMUNITY MUST HEED *Vincent J. Foley*
Christopher R. Nolan 41

CANADA'S OVERSIGHT OF ARCTIC
SHIPPING: THE NEED FOR REFORM..... *Lee Clark* 79

THE EXTENSION OF AN OCEAN
CARRIER'S LIMITATION OF LIABILITY
TO THE INLAND CARRIAGE OF GOODS
UNDER A THROUGH OCEAN BILL OF
LADING: HOW THE SECOND AND
ELEVENTH CIRCUITS HAVE
UNDONE THE WORK OF THE
SUPREME COURT IN *KIRBY* *John M. Daley* 111

RECENT DEVELOPMENTS

LATEST DEVELOPMENTS IN
INTERNATIONAL MARITIME
ENVIRONMENTAL REGULATION *Eric B. Rothenberg*
Robert S. Nicksin 137

COMMENTS

- OIL, MONEY, AND THE ENVIRONMENT:
PUNITIVE DAMAGES UNDER DUE
PROCESS, PREEMPTION, AND MARITIME
LAW IN THE WAKE OF THE
EXXON VALDEZ LITIGATION..... *Brandon T. Morris* 165
- SHORT SEA SHIPPING IN THE
UNITED STATES—THE NEW
MARINE HIGHWAYS *Sean D. Kennedy* 203
- AIN'T NO MONEY IN THE CURE:
ARBITRATION TRUMPS SOLICITUDE
WHEN ENFORCING POSTINJURY
ARBITRATION OF SEAMEN'S
PERSONAL INJURY CLAIMS *Matthew K. Maruca* 229
- THE FLOTILLA DOCTRINE:
IS *LIVERPOOL* SIMPLY OUTDATED
OR IS IT TIME TO ABANDON SHIP?..... *Shannon A. Thornhill* 261
- KEEPERS, WEEPERS, OR NO FINDERS
AT ALL: THE EFFECT OF
INTERNATIONAL TRENDS ON THE
EXERCISE OF U.S. JURISDICTION
AND SUBSTANTIVE LAW IN THE
SALVAGE OF HISTORIC WRECKS *Brooke Wright* 285
- SHIPYARD WORKERS AND
ASBESTOS TORT CLAIMS:
THE SUPREME COURT'S POST-
GRUBART SILENCE CREATES
JURISDICTIONAL UNCERTAINTY *Owen Blood* 313
- NOTE**
- HOW FAR DOES THE FMLA
REACH? THE NINTH CIRCUIT GRANTS
A MARITIME LIEN TO A FOREIGN
NECESSARIES PROVIDER IN
TRANS-TEC ASIA V.
M/V HARMONY CONTAINER..... *Ian Taylor* 337

TULANE MARITIME LAW JOURNAL

VOLUME 33

WINTER 2008

NUMBER 1

Protections Afforded to Captured Pirates Under the Law of War and International Law

Michael H. Passman*

I.	INTRODUCTION	2
II.	THE THREAT OF PIRACY TO INTERNATIONAL SHIPPING	5
	A. <i>Modern Piracy</i>	5
	B. <i>The International Community's Response to Piracy</i>	8
III.	THE LAW OF INTERNATIONAL SEA PIRACY	10
	A. <i>The Definition of Piracy Under International Law</i>	11
	B. <i>The International Mandate To Fight Piracy</i>	13
	C. <i>U.S. Policy Applying an International Mandate To Fight Piracy</i>	14
	1. UNCLOS's Legal Status vis-à-vis the United States	14
	2. The U.S. Municipal Piracy Statute	15
IV.	APPLICATION OF THE GENEVA CONVENTIONS	16
	A. <i>Fundamental Problems with Applying the Geneva Conventions</i>	16
	1. Fundamental Issues of History That May Bar Application of the Geneva Conventions.....	16
	2. Fundamental Issues of the Geneva Convention Text That May Bar Application of the Geneva Conventions	18
	B. <i>The Application of the Third Geneva to Pirates</i>	20
	1. Prisoner of War Categories Applied to Pirates	21
	a. Members of Armed Forces.....	21
	b. Members of Militias Not Part of the Armed Forces.....	23
	c. Members of Armed Forces Professing Allegiance to a Government or Authority Not Recognized by the Detaining Power.....	27

d.	Inhabitants of a Nonoccupied Territory, Who on the Approach of the Enemy Spontaneously Take Up Arms To Resist the Invading Forces, Without Having Had Time To Form Themselves into Regular Armed Units.....	29
2.	Article 5 Hearings To Determine the Status of Pirates.....	30
C.	<i>Application of the Fourth Geneva to Pirates</i>	31
1.	Fourth Geneva Special Protections for Protected Persons.....	31
2.	Fourth Geneva General Protections for Whole Populations.....	33
V.	APPLICATION OF THE U.N. CONVENTION AGAINST TORTURE.....	34
A.	<i>Application of UNCAT's Torture Ban</i>	34
B.	<i>Application of UNCAT's Refouler Ban</i>	35
VI.	APPLICATION OF MORALITY AND BASIC HUMAN RIGHTS.....	37
VII.	CONCLUSION.....	39

I. INTRODUCTION

On January 16, 2006, ten Somali nationals hijacked the M/V SAFINA AL-BIRSARAT, an Indian-registered dhow.¹ These pirates used the dhow² to attack other ships in the area.³ One of the ships radioed the International Maritime Bureau,⁴ which operates a piracy reporting

* © 2008 Michael H. Passman. The author is an associate at Cassidy Schade LLP in Chicago. The author would like to thank Judge Evan J. Wallach of the United States Court of International Trade for his guidance and for reading a number of earlier drafts; CDR James McMahon, USCG of the Naval War College; LT Chris Williams, JAGC, USN of the Naval Academy; and Jean Davis, Linda Holmes, and Harold O'Grady of the Brooklyn Law School Library for their suggestions and research assistance; and Daniel Arking, Alex Haskell, and Benjamin P. O'Glasser for commenting on earlier drafts.

1. John C.K. Daly, *UPI Intelligence Watch*, UNITED PRESS INT'L, Mar. 18, 2006, http://www.upi.com/Security_Terrorism/Analysis/2006/03/17/upi_intelligence_watch/8288.

2. A dhow is a type of ship common to East Africa, India, and the Middle East. See 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 658 (Lesley Brown ed., 4th ed. 1993) (defining "dhow" as "[a] lateen-rigged sailing vessel of the Arabian Sea, with one or two masts"). A modern dhow does not necessarily have sails and masts, but follows the general design of its predecessors.

3. Paul Raffaele, *The Pirate Hunters*, SMITHSONIAN, Aug. 2007, at 38.

4. IMB: International Maritime Bureau, <http://www.icc-ccs.org/imb/overview.php> (last visited Sept. 16, 2008) ("The ICC International Maritime Bureau (IMB) is a specialised division of the International Chamber of Commerce . . . established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice.").